IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 879 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA sd/-
and
Hon'ble MR.JUSTICE D.P.BUCH sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DEVAJI SARDARJI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 879 of 1992

MR DEEPAK M SHAH for Petitioner No. 1

Mr.K.P.Raval, for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE D.P.BUCH

Date of decision: 06/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

1. The appellant - accused has challenged in this Appeal, which is filed through Jail, the Judgment and order of conviction and sentence dated 26.6.1992 passed by the learned Addl. Sessions Judge, Sabar Kantha at Himatnagar, Camp at Modasa, in Sessions Case No.76 of 1991 convicting the appellant - accused for the offence u/s.302 of Indian Penal Code and sentenced him to suffer Life Imprisonment and to pay fine of Rs.200/- indefault to undergo 2 months R.I.

2. It is the prosecution case that the appellant - accused was having doubt in his mind about the character of his wife deceased Mangu, therefore, in the night of 18th & 19th June, 1991, in the early morning hours of 5.00 a.m. the accused killed his wife with "Trikam" in his own house situated at Indran village of Bayad Taluka and ran away. Thus, he has committed the offence u/s.302 of I.P.Code.

3. The prosecution has examined number of witnesses to prove its case against the accused. However, there is only one eye witness to the incident i.e. (i) Dhirajbhai Babubhai, real brother of deceased Manguben, P.W.5, Ex.16. Dhirajbhai is a child witness aged only 10 years. However, the learned Judge, who tried the case, was satisfied that he is in a position to give evidence and therefore oath was administered to him and accordingly he has deposed on oath before the Court. Dhirajbhai has stated in his evidence that he has got 2 sisters, one Kamli and another manguben (deceased). Both the sisters were married in the same house at the same village Indran with two real brothers. Malaji was the husband of Kamli and accused Devji @ Deva was the husband of deceased Mangu. As per his evidence just a day before the incident he along with his mother Masiben, P.W.4, Ex.50, first went to the house of Kamliben and then to the house of deceased Manguben. At about 6.00 p.m. deceased Manguben was all alone. There is a distance of about hardly 500 ft. from the house of Kamliben to Manguben. When they were having food his brother in law accused Devjibhai came there from village Chidiya. His sister gave him water and after taking bath he was given rice which he had. Thereafter, he along with his sister deceased Manguben and her infant daughter, hardly 10 days old, were sleeping in the house at one cot. Accused Deva slept on floor on his pant. Accused Deva gave Trikam Blow on the head of the deceased and hearing the notice of it he woke up. After giving another blow he ran away from the house. Mangu died there and there in the cot.

He raised shouts that Devla killed his sister. Hearing his shouts people gathered there in which his mother Masiben was also there. Accused Devla left Trikam in the house only from which he gave blow to deceased Manguben.

4. In the cross examination witness Dhiraj has stated that after they went to sleep late night his brother in law had come. In the village they go to bed early. When his brother in law came Mangu switched on the light and they had food and thereafter the light was switched off. When Deva came his sister Mangu gave him water, he took bath and thereafter had rice. This was not stated by him before the Police in his statement. He has also stated that he was in deep sleep and woke only after there were shouts. He has also stated that if somebody runs away in the night then one may not know. He has clearly denied the suggestion that because his sister died therefore he was told to depose before the Court in a particular manner.

5. Learned Counsel Shri Deepak M. Shah, appearing for the appellant - accused as appointed Advocate, vehemently submitted that the evidence of Dhirajbhai is not reliable at all. He submitted that he is close relative of deceased Manguben and being brother he is bound to falsely involve the accused. He further submitted that his evidence does not inspire confidence. He was a child witness and he could not have seen the incident and the assaults both because admittedly it was a dark night and Dhiraj himsel stated in his evidence that if somebody runs away in the night then he may not be identified. This submission of Shri Shah cannot be accepted for the simple reason that admittedly in the house only one witness Dhiraj, his deceased sister Manguben, her infant daughter hardly 10 days old and accused were present and no one else. His evidence before the Court that deceased Manguben was sleeping along with her minor daughter in the same cot along with witness Dhiraj has not at all been questioned. When the accused gave blow to the deceased, immediately deceased raised shouts and on hearing her shouts and the noise of the blow Dhiraj must have woke up and immediately he must have seen the accused running away from his house. Thus, except the involvement of the accused the possibility of involvement of any other person has to be ruled out because in the night one would keep the door close from inside, and it may be stated that the incident in question took place at about 5.00 a.m. in the month of June, therefore, in the village it would not be that darkness for which one would not be in a position to identify the person.

6. Shri Shah, then submitted that Dhiraj has not stated in his statement before the Police that when the accused came there his sister gave him water and after taking bath he had rice. It is true that this was not stated by him before the Police and this story has come for the first time in his evidence before the Court. However, we failed to appreciate that how this type of minor omission would render the evidence of witness Dhiraj as not reliable. The presence of witness Dhiraj in the house was never questioned by the accused. In that view of the matter though Dhiraj was hardly aged 10 years, we do not see any reason not to place reliance upon his evidence. It may be stated that Maniben, P.W.4, mother of deceased and Dhiraj, hearing this from Dhiraj that accused Deva killed his wife Mangu, immediately she went to Police Patel Vashram, P.W.3, Ex.30 and in turn Vashram without wasting further time lodged complaint before Bayad Police Station at about 8.30 a.m. Thus, within less than 5 hours of the incident the complaint was lodged and name of the deceased was disclosed. This rules out the possibility of false involvement of any other person.

7. Once we believe the evidence of child witness Dhiraj then there is no reason for us to interfere with the Judgment and order of conviction passed by the learned trial judge. His version has been duly corroborated by Masiben, P.W. 4 and Vashram, P.W. 3.

8. Shri Shah, learned Counsel for the appellant accused tried to submit that the accused was never present at the time of incident which is duly proved in the evidence of Kantibhai Bijalbhai, P.W.11, Ex.26 and Pashana Punja, P.W.12, Ex.27. We have carefully gone through their evidence. Kantibhai, P.W.11, has stated in his evidence that the accused had been to his house and had a night stay, but he had not stated that on the day of incident i.e. between the night of 18th and 19th the accused Deva had night stay at his residence. Another witness Pashana Puja, P.W. 12, has simply stated that only one evening he had been to his place, but he has also not stated that on that evening he was there. In this view of the matter the submission of Shri shah that the accused was not present at the time of incident cannot be accepted.

9. It may be stated that the accused presented himself before the Police after almost 12 years of the incident i.e. on 1.7.1991. If at all he had not committed any offence then there was no reason for him to abscond

for all these days. We have carefully gone through the impugned judgment and order of conviction and sentence passed by the learned Judge and the reasons recorded in it, we are in complete agreement of the same.

10. In view of the above discussion we do not see any reason to interfere with the judgment and order passed by the learned Sessions Judge. Accordingly, this Appeal fails and is hereby dismissed.

sd/-

(B.J.Shethna,J.)

Date : 6.12.2001 sd/-

(D. P. Buch, J.)

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